AHMAD SHAFIAI SINIK A

v.

FELCRA BHD

HIGH COURT MALAYA, IPOH B
CHOONG SIEW KHIM JC
[CIVIL APPEAL NO: 12B NCVC-49-2011]
14 JUNE 2012

LAND LAW: *Trespass - Encroachment on land - Drastic change of land* C
shape - Cutting down of tree expected to yield fruits over the next five years and digging of canal - Proprietorship of land - Whether trespass and encroachment occurred - Whether sessions court judge correct in evaluation of evidence - Whether damages a realistic net figure

The appellant, the registered owner with a qualified title over a D
piece of land, alleged that the respondent had trespassed his land by cutting down 54 oil palm trees expected to yield fruits over the next five years and by digging a canal over part of his land. The canal was dug next to the appellant's land to create a boundary E
between FELCRA settlers and those, like the appellant, who were managing their own lands. As a result of the respondent's act, the shape of the appellant's land had been drastically altered. A land surveyor acting under the appellant's instruction reported that that although the size remained the same, the land was squarish in the F
qualified title but became rectangular in the final title. On the other hand, the respondent relied on a subsequent survey report ('D6') prepared by a private surveyor and the issuance of final title ('P3'). Despite not specifically denying cutting down 54 trees and the digging of canal on part of the appellant's land, the G
respondent averred that the activities were done outside of the appellant's land. In his police report, the appellant reported loss of RM50,000 but in court, he claimed damages in the sum of RM135,000 for loss of 54 trees at RM500 per tree per year over five years. The appellant's claim was dismissed by the Sessions H
Court, and the appellant appealed.

Held (allowing appeal with costs):

(1) The learned Sessions Court judge had clearly and obviously erred in her evaluation of the evidence adduced and her I
consideration of the law applicable when dismissing the appellant's claim. (para 29)

(2) The irresistible inference and conclusion to be drawn was that the respondent had encroached and trespassed on the appellant's land when they unilaterally acted the way they did at the material time. The appellant's proprietorship and interest over the land could not be denied and was certainly entitled to damages arising from the trespass which led to the loss of 54 trees that still yielded oil palm fruits. (paras 22 & 26)

(3) The clearing of 54 trees and digging of canal was carried out when the land was held on a qualified title by the appellant well before the survey as per D6 and registration and issuance of P3. The subsequent survey leading to D6 and the final title P3 were irrelevant to this finding. (para 22)

(4) The court assessed the loss at RM50,000, in accordance with the appellant's police report which was a more realistic net figure as compared to the sum of RM135,000 unless otherwise agreed by both parties. (para 27)

Legislation referred to:

National Land Code, ss. 83(1), (2), (3), 92, 176(1), (2)(a), 340(1)

For the appellant/plaintiff - Navaneetha Krishnan M Pillay; M/s Loh Poh Seng & Co

For the respondent/defendant - Hj Mohamed Musa Mohamed Haneefa; M/s Musa

Reported by Najib Tamby

JUDGMENT

Choong Siew Khim JC:

[1] 12BNCVC-48-2011, 12BNCVC-49-2011 and 12BNCVC-51-2011 are three appeals against the decision of the trial Sessions Judge who dismissed the appellants'/plaintiffs' claim for damages for trespass. From the outset, counsel for both parties agreed to confine their submissions to appeal 12BNCVC-49-2011 and that a decision on this appeal will bind the other two.

[2] Ahmad Shafiai bin Sinik, the appellant/plaintiff (hereinafter referred to as "the appellant") was a settler who had been alienated a plot of land by the State Government upon the appellant fulfilling the terms and conditions stipulated in the

agreement entered with the respondent on 8 February 1985 (P1, on pp. 86-92 of the appeal record). The appellant was conferred a qualified title on land held under HSM 2835 PT 5613 on 28 December 2006. It ought not be disputed that this rendered him as the registered owner of this piece of land. He alleged that sometime in April 2007, the respondent trespassed onto his land by cutting down fifty four (54) oil palm trees expected to yield fruits over the next five years and digging a canal over part of his land held on the said qualified title.

[3] The appellant (witness SP1) claimed damages of RM135,000 for loss of 54 trees at RM500 per tree per year over five years as follow:

1 tree = RM500 a year.

1 tree over five years = 500 x 5 = RM2,500

(remaining life-span of tree)

54 trees = 2,500 x 54 = RM135,000

[4] He testified in chief (on p. 38 of the appeal record):

> Saya telah rugi lebih kurang RM500 sekali potong buah. Saya anggarkan setahun saya rugi RM500 untuk sebatang pokok. Saya anggarkan pokok akan berbuah untuk 5 tahun lagi. Anggaran kerugian ialah RM135,000.

[5] In cross-examination (on p. 43, appeal record), SP1 agreed he reported loss of RM50,000 in his police report (p. 115 of appeal record). SP1 further said in cross-examination (on p. 43) that RM500 was the gross price before deducting maintenance costs ("kos penyelenggaraan").

[6] SP4 (an Assistant Land Administrator) confirmed the document of qualified title (ID2) was issued by her office (Land Office) and registered on 28 December 2006 (see p. 49 of appeal record).

[7] SP4 clarified however that the Land Office was not involved in the difference in the shape of the said land (on p. 51 of appeal record):

> Pejabat tanah tidak terlibat dalam perbezaan bentuk tanah ini.

A **[8]** SP5 (Yap Sze Pin), a qualified licensed land surveyor, was instructed by the plaintiffs in all three suits to survey their land on 20 August 2009 as a result of which he prepared his report P10 (p. 101 of appeal record) with reference to three plans (P9A -C on pp. 103-105 of appeal record).

B **[9]** He testified that "final title is irregular as it does not follow the qualified title" (on p. 52, appeal record) as per his opinion on the last para. of P10. In the qualified title, there was a road reserve and track but under the final title, these were missing.

C **[10]** There were eight lots on one side with four lots on the other (with obvious reference to the final title and plan) as compared with the qualified title with six lots on each side.

[11] The respondent/defendant could not deny the shape of the D appellant's land had been drastically altered as a result of their act in clearing trees on part of the appellant's land and digging a canal on that land. The land is squarish in the qualified title while for the final title, the shape is rectangular although the size of 1.214 hectares remained the same.

E **[12]** SD1 in cross-examination said that the canal was dug next to the appellant's land in order to separate those settlers under FELCRA from those managing their own land as in the case of the appellant (on p. 55, appeal record):

F Q: Mengapa dibina di tanah bersebelahan tanah ketiga-tiga plaintif?

A: Untuk memisahkan peserta-peserta di bawah FELCRA dan peserta-peserta yang uruskan sendiri ladang mereka.

G **[13]** He further revealed it was the management of FELCRA that decided on the area to dig the canal (on p. 56, appeal record):

Q: Siapa yang menentukan tempat tali air digali?

H A: Pengurusan FELCRA.

[14] He was however not sure why land of different shape was given to the plaintiffs/appellants.

[15] SD2 echoed what SD1 said that the canal was dug to built I a boundary between "peserta-peserta FELCRA dengan yang urus sendiri" (on p. 59, appeal record).

[16] Based on SP4's confirmation that ID2 (SP1's qualified title over the land) was issued by her Land Office and registered on 28 December 2006, it was a fact that as of then SP1 was registered as the sole proprietor of the land with the issuance of the qualified title. It was not rebutted by the respondent that the qualified title was basically to enable title to be issued in advance of survey (with reference to s. 176(1) of the National Land Code). Pursuant to s. 176(2)(a), a qualified title shall confer on the proprietor the like rights in every respect as those conferred by a final title as mentioned in s. 92 of the National Land Code save that the boundaries of the land shown on the document of title shall be provisional only except so far as any of them may have been established by any earlier survey.

[17] The indefeasibility of SP1's title *albeit* qualified was underscored by s. 340(1) of the National Land Code.

[18] The cutting of 54 trees and digging of canal on part of SP1's land held on this qualified title was in April 2007 when the respondent carried out re-planting near his land without giving notice to him (see SP1's police report on p. 115, appeal record).

[19] The respondent countered this by alleging that the cutting of trees and digging of canal was done outside SP1's land. They relied on D6 prepared by a private surveyor Ahmad Azmi bin Abd. Aziz on 5 September 2008 and approved by the Director of Survey and Mapping on 25 September 2008. This is consonant with para. (7) of their statement of defence.

[20] The final title (P3) was registered on 2 February 2009 with the shape of the land drastically altered (see plan on p. 100 of appeal record for final title as compared with plan on p. 96, appeal record for qualified title registered on 28 December 2006).

[21] The respondent did not specifically deny the cutting down of 54 trees and digging of canal in April 2007 on part of SP1's land (as pleaded in paras. 7 and 9 of the statement of claim).

[22] It was indisputably clear that the clearing of 54 trees and digging of canal was carried out when the land was held on a qualified title by SP1 well before the survey as per D6 and registration and issuance of P3. SP1's proprietorship and interest over the land could not be denied. The irresistible inference and conclusion to be drawn was that the respondent had encroached and trespassed on SP1's land when they unilaterally acted the way they did at the material time.

[23] The subsequent survey leading to D6 and the final title P3 are, in my view, irrelevant to this finding. For the sake of arguing it may be relevant, the variation yet ought not be substantial in line with s. 83(1) and (2) of the National Land Code:

> 83. Survey for purposes of alienation under final title.
>
> (1) Subject to sub-sections (2) and (3), where any land is surveyed in accordance with the provisions of section 396 for the purpose of its alienation under final title, the boundaries determined on the survey shall accord as nearly as may be with those indicated by the plan and description by reference to which the approval of the State Authority was given.
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> (2) The Director of Survey and Mapping may if he thinks it necessary or desirable to do so in the circumstances of any particular case authorise the determination on any such survey of boundaries which are at variance with those indicated as aforesaid, but not so as to cause the determination of boundaries the volume enclosed by which would, in his opinion, exceed to any substantial extent that provisionally approved for alienation.

[24] In the event the area enclosed by the boundaries determined on the said survey was substantially different, which was the case here, the Director of Survey shall refer the matter for the direction of the State Authority under sub-s. (3):

> (3) Where it appears to the Director of Survey and Mapping that the Volume enclosed by the boundaries determined on any such is substantially different from that provisionally approved for alienation, he shall, before approving any plan of the land under section 396, refer the matter to the State Authority, and cause the boundaries to be redetermined to such extent, and in such manner, if any, as the State Authority may direct.

[25] No one from JUPEM nor the Director of Survey who endorsed D6 was called by the respondent to explain whether the obvious boundary discrepancy was redetermined by such extent within the mandatory provision of s. 83(3) of the National Land Code.

[26] SP1 was certainly entitled to damages arising from the trespass which led to the loss of 54 trees which still yielded oil palm fruits.

[27] With reference to the computation in the third paragraph above, SP1's contention with regard to loss of RM500 per tree per year and expected yield for a further five years was not seriously refuted by the defendant. An amount surely had to be deducted for maintenance costs which SP1 however failed to specify and ascertain. The amount of RM135,000 was also SP1's estimate without production of his yield for the remaining 90 trees (see p. 38, appeal record). The loss of yield and income from the 54 trees was real but being not specifically substantiated, I would rather prefer to assess the loss at RM50,000 to be awarded to SP1 in accordance with his police report which I consider to be a more realistic net figure as compared to the sum of RM135,000 unless otherwise agreed by both parties. Nothing else was adduced or produced to prove other heads of damages, particularly prayer 14(d) of the statement of claim.

[28] It is a fact which has to be accepted by SP1 that a final title has been registered and issued to him. To date he has done nothing to rectify the plan of his land on the register document of title and on this matter, this court cannot assist him in its decision on this appeal. The ball is in his court to seek the appropriate remedy if and how he deems it fit and necessary.

[29] Ultimately, in agreeing with the submissions and contentions of the appellant and on the premise that the learned Sessions Judge had clearly and obviously erred in her evaluation of the evidence adduced and her consideration of the law applicable when dismissing the appellant's claim, the appeal is allowed with costs here and below.